IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

NO. 80-254

STATE OF CALIFORNIA, Petitioner

vs.

ALMON BOYD SMITH, Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondent, Almon Boyd Smith, by and through his counsel, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavit of Respondent in support of this motion is attached hereto.

DATED: November 10, 1980

PETER R. SILTEN
Deputy State Public Defender

Counsel for Respondent

10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALMON BOYD SMITH,
Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, ALMON BOYD SMITH, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to pre-pay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. The nature of said cause is briefly stated as follows:

On January 26, 1979, after my motion to suppress evidence was denied, I entered a plea of nolo contendere to embezzlement of an automobile, a violation of

California Penal Code section 487. On March 1, 1979, I was placed on three years' probation. One of the conditions of my probation was that I serve one year in the county jail. On March 27, 1980, the California Court of Appeal, First Appellate District, Division Three, reversed my conviction on the ground that certain items taken from my mother were illegally seized.

Almon Boyd Smith
ALMON BOYD SMITH

State of California)
) ss.
County of Los Angeles)

On November 7, 1980, before the undersigned, a Notary Public for the State of California, personally appeared ALMON BOYD SMITH, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

Beatriz R. Bland
BEATRIZ R. BLAND

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT, DIVISION THREE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUIN DENVIR
State Public Defender

PETER R. SILTEN
Deputy State Public Defender

1390 Market Street, Suite 425
San Francisco, California 94102
Telephone: (415) 557-1600

Counsel for Respondent

12/

QUESTIONS PRESENTED

Does this Court have jurisdiction to entertain a petition for writ of certiorari in a criminal case dismissed by the trial court on motion of the prosecutor?

Once an arrestee's personal effects have been inventoried and inspected during a "booking" search, do they remain subject to warrantless searches without probable cause for the period of incarceration?

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NO. 80-254

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OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALMON BOYD SMITH,

Respondent.

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent, Almon Boyd Smith, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Court of Appeal's decision in this case. That decision is reported at 103 Cal.App.3d 840, 163 Cal.Rptr. 322 (1980).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the provisions relevant to this case.

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case with the following additions:

On July 10, 1980, respondent's case was called in the superior court. At that time, the district attorney requested that the case against respondent be dismissed under California Penal Code section 1385.[1/] The superior court granted the district attorney's request. Thereafter, on July 16, the district attorney asked that the criminal proceedings against respondent be reinstated. Over respondent's objection, the superior court reinstated the charge against respondent.

On July 22, 1980, respondent filed in the California Court of Appeal a petition for a writ of mandate and/or prohibition challenging the superior court's order of July 16, 1980, as being void and of no effect whatsoever.

On September 11, 1980, the Court of Appeal issued an alternative writ of mandate (App. A).

On October 21, 1980, the Court of Appeal heard argument in this matter. We are now awaiting decision.[2/]

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1. California Penal Code section 1385 provides in relevant part:

> "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

2. As recognized by Mr. Justice Rehnquist's conditional stay order in this case, this action has a direct bearing on the status of respondent's case in this Court. Should the California Court of Appeal conclude that the superior court's order of July 16, 1980, reinstating respondent's case, is void, then the superior court's dismissal of respondent's case entered on July 10, 1980, stands and, as far as this Court is concerned, respondent's case is moot.

STATEMENT OF FACTS

On February 13, 1978, at 8:00 a.m., Officer Michael Stafstrom of the Berkeley Police Department, learned that Ms. Zeel Harris had been arrested and booked into the Berkeley City Jail the night before on an arrest warrant from the Santa Ana Police Department charging grand theft of an automobile, a 1977 Chevrolet, and that the automobile involved, but not its keys, had been recovered.

Officer Stafstrom was interested in Ms. Harris because he was looking for her son (respondent) who was wanted on a complaint of auto embezzlement involving a 1978 blue Ford, license number 617 SCY. Officer Stafstrom did not kn w where respondent or the Ford were.

Shortly after nine o'clock the same morning, Officer Stafstrom, without a warrant, obtained Ms. Harris' personal property from the prisoner's locked property room in the Berkeley City Jail. He opened Ms. Harris' purse and searched through it until he located the keys to the stolen automobile. He then rummaged through her wallet, took out her driver's license and found written on the back of it the address 579 Grizzly Peak Boulevard in Berkeley.

On the same day, Officer Stafstrom, still without a warrant, went to 579 Grizzly Peak Boulevard, Berkeley, where he found a blue Ford, license number 617 SCY.

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REASONS FOR DENYING THE WRIT

I

THE PRESENT CASE IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT IS MOOT

As previously noted, the case against respondent was ordered dismissed by the superior court. This dismissal was entered pursuant to the request of the district attorney. Thereafter, once the district attorney realized that the California Attorney General wished to pursue respondent's case in this Court, he went back to the superior court and asked that respondent's case be reinstated. On July 16, 1980, over respondent's objection, the superior court reinstated respondent's case. Subsequently, respondent filed in the California Court of Appeal a petition for a writ of mandate and/or prohibition challenging the superior court's reinstatement of his case. On September 11, the California Court of Appeal issued an alternative writ of mandate commanding the superior court to vacate its order of July 16 reinstating respondent's case, or to show cause why it had not done so. Argument was heard on October 21, 1980, and we are now awaiting the Court of Appeal's decision.

The decision of the California Court of Appeal in Smith v. Superior Court (People), 1 Civil 50184, is of the utmost importance to the case before this Court. If the California Court of Appeal decides that the superior court was without any power to reinstate respondent's case, then the superior court's order of July 10 stands and respondent's case is dismissed. This would render the case before this

Court moot and require a dismissal. Williams v. Simons, 355 U.S. 49 (1957).

> "This Court is empowered by the Constitution to decide cases and controversies. [Citation.] A cause that has become moot is not a case or controversy in the constitutional sense. [Citation.] We cannot underscore this principle too heavily. We have no business in giving any expression of views on the merits, even in squinting one way or another." Williams v. Simons, supra, at 57-58 (Douglas, J., concurring).

Under the circumstances, this Court should take no action until the California Court of Appeal renders its decision in Smith v. Superior Court (People), supra, which, under the provisions of the California Constitution should occur on or before January 19, 1981 (see Cal.Const., art. VI, § 19).

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II

THE PRESENT CASE IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT DOES NOT CLEARLY PRESENT A FEDERAL QUESTION

In finding that the search in the present case was unlawful, the California Court of Appeal cited not only this Court's decision in Chimel v. California, 395 U.S. 752 (1969), but also its own prior decision in People v. Flores, 100 Cal. Rptr. 839 (1979), which in turn rests upon California Constitution, article I, section 13.[3/] People v. Flores, supra, 100 Cal.App.3d at 229, 160 Cal.Rptr. at 844.

Under these circumstances, respondent's case was decided on state law grounds. Should there be any uncertainty on this score, at most the present case should be returned to the California Court of Appeal so that it may clarify whether its decision is grounded on federal or state constitutional grounds, or both. California v. Krivda, 409 U.S. 33 (1972). Of course this would be necessary only in the event that the present case is not moot.

If respondent is correct that his case was decided on state constitutional grounds, then it would be inappropriate for this Court to grant certiorari review. See Jankovich v. Toll Road Comm'n., 379 U.S. 487, 489 (1964).

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3. California Constitution, article I, section 13, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

III

THE CALIFORNIA COURT OF APPEAL'S DECISION IN THIS CASE IS CORRECT

A. The Warrantless Search of Ms. Harris' Personal Property Stored In Jail Was Unlawful Because It Occurred After Booking Had Ended.

The Fourth Amendment's warrant requirement must be satisfied in every case where exigent circumstances do not exist. In California, that constitutional principle is reflected in the rule placing upon the prosecution the burden of establishing the legality of any search not conducted pursuant to a warrant. People v. Maher, 17 Cal.3d 196, 203, 130 Cal.Rptr. 508, 514 (1976).

> "As the court in Katz [Katz v. United States, 389 U.S. 347 (1967)] explained: '. . . this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," [citation.], for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ."' [citations.]." Lorenzana v. Superior Court, 9 Cal.3d 626, 639, 108 Cal Rptr. 585, 595 (1973). See also Arkansas v. Sanders, 442 U.S. 753, 760 (1979).

In a few well-defined situations, exceptions are made to the rule requiring a warrant. One such exception allows warrantless searches of property if there are exigent circumstances, "such as danger to law officers, or the risk of loss or destruction of evidence." Arkansas v. Sanders, supra, 442 U.S. at 759. California law also recognizes another exception: the warrantless booking search. The booking search is made contemporaneously with entry into jail and

has a three-fold purpose: (1) to maintain jail security, (2) to search for weapons, contraband, means of escape and evidence of the crime for which the person has been arrested, and (3) to store and safeguard the arrestee's personal property while he is in custody. Cal. Gov. Code § 26640; People v. Maher, supra.

Officer Stafstrom's search of Ms. Harris' property does not fall within either the exigent circumstances or booking search exception.[4/] Once her purse was put in the property locker, the police officers were no longer in any danger, nor was there any chance that evidence would be lost or destroyed. The booking search and inventory process had been completed during the night before Officer Stafstrom came on duty. Once that process had been completed, the police had no justification to take a second look without getting a warrant.

In all the cases that have upheld a search of an arrestee's property on introduction into jail, the booking period was not yet over when the search was made. In the leading federal case of United States v. Edwards, 415 U.S. 800 (1974), the police searched defendant's clothing the morning after he was placed in jail. But the court there noted that, "the normal process incident to arrest and custody had not been completed when Edwards was placed in his cell on the night [before the search]" (id., at 776).

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4. Note that although appellant's own property is not involved in this case, he has standing under California law to assert the Fourth Amendment rights of Ms. Harris and the violation thereof. (People v. Gale, 9 Cal.3d 788, 793, 108 Cal.Rptr. 852, 856 (1973).

In Edwards, the police allowed defendant to keep his own clothing overnight since it was difficult at that hour to get him substitute clothing. The police had probable cause to suspect that his clothing might contain evidence of the crime for which he was arrested. They therefore merely delayed, for convenience sake, the booking search that they were entitled to conduct initially. The police were simply completing the booking process; they were not coming back to take a second look for something they neglected to find before locking away his goods.[5/]

In the present case the usual reasons justifying police in performing a booking search (to prevent introduction of contraband or weapons into jail, to discover fruits of the crime) do not provide a compelling justification for the police to have taken a second look at Ms. Harris' property. Certainly once the police had all her belongings safely locked in the jail property room, there was no danger that weapons or contraband could be introduced to other inmates. There was still the possibility of discovering the fruits of a crime, but if the police genuinely suspected that there was something they had missed on the initial booking search, there was no reason why they could not have obtained a warrant for a second look.

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5. As the Court of Appeal noted, one commentator suggests that Edwards' reliance on the incident to arrest exception is misplaced and that the case can better be explained as involving a plain view seizure, since Edwards' clothes were still on his back. 2 LaFave, Law of Search and Seizure, section 5.3(b), p. 314. (See Appendix to Petition for Certiorari, A-5)

B. Once Ms. Harris' Property Was Reduced To Exclusive Police Control There Were No Longer Any Exigent Circumstances Excusing The Police From Obtaining A Warrant Before The Search

Courts have established the rule that once an item of the arrestee's property comes under an officer's exclusive control, an immediate search is no longer necessary and a warrant must be obtained for a search of the item unless exigent circumstances dictate an immediate search. United States v. Chadwick, 433 U.S. 1 (1977). In Chadwick this Court found that there was no exigency dispensing with the warrant requirement where federal agents seized a locked footlocker from defendant's car and searched it without a warrant three hours later, at headquarters.

> ". . . warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from arrest,' * * * or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." Id., at 15. See also United States v. Schleis, 582 F.2d 1166, 1172 (8th Cir. 1978).

In United States v. Jones, 317 F.Supp. 857 (E.D. Tenn. 1970), a federal case whose facts are almost identical to those in the present case, a jailer searched through a prisoner's billfold without a warrant after the billfold had been taken from the prisoner's immediate control and come into the control of the jailer (Mr. Ward).[6/] The district

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6. Jones dealt with a billfold. Other cases have held there is an expectation of privacy in a footlocker, United States v. Chadwick, supra, 433 U.S. 1, a briefcase, United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978). Certainly, the expectation of privacy in a purse is at least as great as that in a tote bag or billfold. What the court in Arkansas v. Sanders, supra, 442 U.S. at 762, said of luggage applies to purses since they are "a common repository for one's personal effects, and therefore [are] inevitably associated with the expectation of privacy."

court there held that

> "There was no justification for Mr. Ward's searching through Mr. Jones' billfold without a search warrant after the billfold was no longer 'within his immediate control.' Chimel v. California (1969) 395 U.S. 752, 763. After it departed Mr. Jones' immediate control and went into the immediate control of Mr. Ward, Mr. Jones could not have extracted therefrom any dangerous weapon, anything that Mr. Ward reasonably deemed necessary to the latter's safety or the public safety, anything detrimental to Mr. Jones' safekeeping; or any instruments or evidence of the crime for which Mr. Jones was being held in custody as might have been of use as evidence on the trial of the offense for which the arrest was made, or might have enabled Mr. Jones to escape, such as weapons, tools, keys and the like." Id., at 858.

In Brett v. United States, 412 F.2d 401 (5th Cir. 1969), police conducted a warrantless search of defendant's clothing three days after it had been put in the prisoner's property room for safekeeping. Since Brett was already in police custody, he could not have gained access to his clothing. The clothing, therefore, was not in danger of being removed elsewhere, or of being destroyed, and it was not available to the defendant as a source of obtaining escape weapons. The court ruled that the search was invalid, stating that

> "The fact that the police have custody of a prisoner's property for the purpose of protecting it while he is incarcerated does not alone constitute a basis for an exception to the requirement of a search warrant." Id., at 406.

Other jurisdictions have considered the issue of whether such a post-booking or post-arrest search requires a warrant, and these jurisdictions have concluded that a warrant is required. See, e.g., Faubion v. United States, 424 F.2d 437 (10th Cir. 1970) (suitcase); United States v. Jackson, 576 F.2d 749 (8th Cir. 1978) (attache case); United

States v. Marchand, 564 F.2d 983 (2nd Cir. 1977) (wallet); United States v. Berry, 560 F.2d 861 (7th Cir. 1977) (attache case), vacated on other grounds, 571 F.2d (7th Cir. 1978).

CONCLUSION

For the reasons stated herein, respondent respectfully urges that this Court deny the petition for a writ of certiorari.

DATED: November 10, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

PETER R. SILTEN
Deputy State Public Defender

Counsel for Respondent

PRS:lbl

APPENDIX A

FIRST APPELLATE DISTRICT
DIVISION THREE

COPY

Almon Boyd Smith, Petitioner, vs. Alameda County Superior Court, Respondent, People of the State of California, Real Party in Interest.	No. 1/Civil 50184 ALTERNATIVE WRIT OF MANDATE

The People of the State of California to the Superior Court of the State of California, _____ County of Alameda, Greeting:

The petition for a writ of mandate on file herein having been considered and good cause appearing for the issuance of this alternative writ of mandate,

WE DO COMMAND YOU, forthwith upon receipt of this writ, to vacate your order of July 16, 1980, in Alameda County Superior Court Action No. 67239, People v. Smith,

or in the alternative that you show cause before Division Three of this Court on Tuesday, October 21, 1980 at 10:00 a.m. in its courtroom in the State Building, San Francisco, California, why you have not done so.

The written return, if any, to this alternative writ is to be served and filed on or before October 2, 1980.

Witness the Honorable Clinton W. White, Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division Three.

Attest my hand and the Seal of this Court this 11th day of September, 1980.

SEAL

Clifford C. Porter Clerk

By _____
Deputy Clerk

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

NO. 80-254

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PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALMON BOYD SMITH,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

PETER R. SILTEN, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 1390 Market Street, Suite 425 in the City and County of San Francisco, State of California; that on November 10, 1980, he served a true copy of the attached Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopes addressed respectively as follows:

George M. Deukmejian
Attorney General of the State of California
6000 State Building
San Francisco, California 94102

D. Lowell Jensen
District Attorney, Alameda County
1225 Fallon Street
Oakland, California 94612

Rene C. Davidson
County Clerk, Alameda County
1225 Fallon Street
Oakland, California 94612

Clerk, California Court of Appeal
State Building
455 Golden Gate Avenue
San Francisco, California 94102

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

PETER R. SILTEN